held that as the hospital had used due care in the selection of the nurse they were not answerable for the plaintiff's injury.

This decision seems correct on principle as well as on authority. As a general rule it is unjust to make a man who is personally free from fault answerable for the torts of another. The rule that makes a master liable for the torts of a servant appears to have but one justification that can stand the test of reason, namely, that as the master receives all the incidental benefits of his servant's labor he should also bear the incidental burdens. However well this may apply in the ordinary cases of agency, the justification seems wanting in a case like the present, where the real beneficiaries are the patients and not the corporation. As a practical matter it may be said also that unless the strongest reason demands it, the courts should not cripple the beneficent work of such institutions by forcing them to pay damages. Holding them liable when their trustees are personally blameless will not only work an injury to the public directly, but will have an appreciable effect in the future in discouraging donations. Damages granted against corporations are notoriously large, and charitable persons will refuse to give if they are led to believe that their money will eventually go to pay undeserved judgments and lawyers' fees.

A LIMITATION UPON THE TRANS-MISSOURI FREIGHT DECISION. — In the decision of the Trans-Missouri Freight Case one loophole was left by which to escape the sweeping rule that all contracts in restraint of trade, even if reasonable, are void under the Trust Act of 1890. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. "A contract," said Mr. Justice Peckham, "which is the mere accompaniment of a sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which is in effect collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question." Acting upon this dictum, the court in a recent New York case, in the Appellate Division of the Supreme Court, found the statute inapplicable to a case arising out of the following facts. The plaintiff had contracted with the defendant, for valuable consideration, to convey to him for a limited period his goodwill in the business of freighting the Haiti Packets and vessels for Port-au-Prince, agreeing not to solicit freight or to compete in the business during the term. The plaintiff now sued for the first three months' instalments of the purchase money, alleging performance on his part. The defendant contended that the plaintiff's agreement not to compete, although at common law it would have been binding as a reasonable restraint, was void under the Trust Act of 1890; and that this vitiated the whole contract. The court, however, decided that since the agreement in question was merely collateral to the sale of the goodwill, it was therefore valid. *Brett* v. *Esel*, New York Law Journal, May 13, 1898.

The decision of the New York court is salutary, and the court were certainly justified in making use of any reasonable loophole afforded by the United States Supreme Court. The reason of that loophole, however, is more in doubt. It is true, as Mr. Justice Peckham points out, that most of the contracts partially in restraint of trade that have been allowed have been collateral to transfers of property; but the courts in those cases would have been rather surprised if they were told that they could

not have decided as they did if the contracts in question, although reasonable, had not been incidental to sales of property. They considered the fact of the sales only as shedding light upon the reasonableness of the transactions. *Green* v. *Price*, 13 M. & W. 695, 698. It can hardly be seriously supposed that the distinction taken had any further existence at common law; and if it has any validity in the present connection it must be by construction of the statute. It is hard to see why the fact that the agreement is collateral to a sale of property should place it beyond the operation of the statute. If that element, however, has the effect claimed, it may further be questioned whether it was present in the principal case; for by the better view a sale of goodwill is not a sale of property. Goodwill is property only by a figure of speech, and when the plaintiff here sold his goodwill he really did no more than bind himself to place the defendant in a position where he might benefit from all the combined circumstances of the business which the plaintiff had organized. The agreement not to compete was then merely incidental to an affirmative contract to place the defendant in the plaintiff's shoes, and was not collateral to a transfer of property. It was incidental to a transaction which resulted in something valuable to each party; and the Federal Supreme Court might, perhaps, extend their rule to cover the present case. But few contracts do not result in something valuable to each party; and shall the rule be extended so as to sanction all contracts in reasonable restraint of trade when they are collateral to contracts which are, from a pecuniary standpoint, valuable to the parties? The line is not easy to draw in applying a rule based upon reasoning which is metaphysical at best. One feels inclined, however, to support the decision in the principal case because of the necessity of limiting the operation of the Trans-Missouri decision to cases where the facts are directly parallel; and the New York court may well have been right in holding that the Trust Act was aimed directly against combinations and monopolies, and did not apply to cases like the present where the element of combination did not exist.

THE RIGHT TO A BENEFIT. — It is characteristic of the growth of the law that a case of first impression is often of more value for the conclusion reached than for the hypothesis upon which it proceeds. So it is in *Keernan* v. *Metropolitan Construction Co.*, 49 N. E. Rep. 648 (Mass.); one accepts the result in some doubt as to the nature of the right involved. The facts are somewhat curious. The defendant company was using a fire hydrant under a right to supply its engine in the construction of sewers. A fire broke out in the plaintiff's house, and the defendant's servants for a time forcibly prevented the use of the hydrant by the fire department of the city. For the damage resulting to the plaintiff from the delay so caused the Massachusetts court holds the defendant liable.

To determine the character of the plaintiff's right is a matter of much difficulty. It is well recognized that the plaintiff has no enforceable right against a public corporation to have public servants extinguish her fire, for the function is governmental. *Springfield Fire Ins. Co.* v. *Keeseville*, 148 N. Y. 46. To support the decision, however, the principal case recognizes a less tangible right to have firemen get water if they choose to do so, in order to put out a fire in the plaintiff's house. Precise analogies to the right thus defined do not appear. It is possible that this right to have the unobstructed use of water from a public system of supply may